SURFACE RIGHTS BOARD

ANNUAL REPORT

April 1, 2015 to March 31, 2016

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Board Profile and Mandate

The Surface Rights Board (SRB or the Board) is a quasi-judicial administrative tribunal established under the *Petroleum and Natural Gas Act* (*PNGA*). The Board has jurisdiction to resolve disputes under the *PNGA*, *Mining Right of Way Act*, *Mineral Tenure Act*, *Geothermal Resources Act*, and *Coal Act*.

In British Columbia, most landowners do not own subsurface rights to petroleum, natural gas, or minerals. The majority of subsurface rights are owned by the Crown. The government can issue rights to resource companies and free miners for the exploration and development of subsurface resources on private property. The resource company or free miner must compensate landowners for loss or damage caused by entering and using their land to access subsurface resources. The Board's role is to assist in resolving disputes when the parties cannot agree on compensation or other terms of entry to land.

When a landowner and a resource company or free miner are unable to reach an agreement on right of entry to the land and the compensation that should be paid to the landowner for that right of entry, either party may apply to the Board for mediation and arbitration of the dispute. The Board may make an order allowing a person or company to enter private land if the Board is satisfied they need the land to explore for, develop, or produce a sub-surface resource. The Board does not have jurisdiction to determine whether a proposed subsurface installation is appropriate or complies with the legislation and regulations.

If damage to land is caused by an entry for the purpose of exploring for, developing or producing a subsurface resource, the landowner may apply to the Board for mediation and arbitration of damages payable by the subsurface holder.

If the parties to a surface lease cannot agree to terms for rent renegotiation after a certain period of time, either party may apply to the Board for mediation and arbitration of their dispute.

The Board also has jurisdiction to resolve disputes about whether the terms of a surface lease have been complied with.

An overview of the Board's processes may be found in Appendix 1.

The Board is accountable to the Minister of Natural Gas Development but is independent of the Minister and Ministry in its decision making capacity and in the management of applications before it.

The Board has a part-time chair, and may have up to eight additional part-time members.

The following Board members served during fiscal year 2015/16:

Name	Position	Start date	Expiry
Cheryl Vickers	Chair	July 22, 2007	December 31, 2018
Simmi Sandhu	Vice Chair as of Jul 22/12	July 22, 2007	July 31, 2018
Valli Chettiar	Member	June 22, 2012	Resigned August 2015
Winton Derby	Member	June 2, 2014	July 31, 2019
Robert Fraser	Member	February 13, 2014	December 31, 2018
Howard Kushner	Member	June 2, 2014	July 31, 2019
Brian Sharp	Member	November 23, 2012	December 31, 2015

Biographical information on the Board Members is at Appendix 2.

Dispute Resolution Activities

The Board received 48 applications from April 1, 2015 to March 31, 2016, under the *PNGA*. The Board received one application under the *Mineral Tenure Act* (*MTA*). The Board did not receive any new applications under the *Mining Right of Way Act (MRWA), Coal Act* or *Geothermal Resources Act*. The following chart shows the number of applications by type received from April 1, 2015 to March 31, 2016 compared to the previous year.

Nature of Application	**# received in period**	**2014/15**
PNGA (right of entry/compensation for wellsite)	5	5
PNGA (right of entry/compensation for flowline)	11	12
PNGA (right of entry/compliance/related activity	0	0
PNGA (damages)	3	0
PNGA (rent review)	8	42
PNGA (compliance)	17	1
PNGA (termination of surface lease)	1	0
MRWA	2	0
MTA	1	1
Total new applications	**48**	**64**
Cases outstanding from previous year	73	44
Total caseload in period	**121**	**108**

When the Board receives an application for right of entry for an oil and gas activity, a mediator will determine whether access to land is required for the requested activity, and if so, work with the parties to try and resolve compensation. The Board does not have jurisdiction to determine if a requested activity meets regulatory requirements or to deal with landowner's concerns respecting placement of an installation, environmental impact, or safety – these are matters within the jurisdiction of the Oil and Gas Commission (OGC). The Board will generally require parties to resolve issues within the jurisdiction of the OGC prior to issuing an entry order. The mediator will continue to work with the parties in an effort at resolving compensation issues even after an entry order has been made until the mediator determines a resolution is unlikely. Once the mediator refuses further mediation, the dispute is referred to an arbitrator for adjudication. An application may require several mediations before it is either resolved or referred to arbitration.

The Board similarly mediates applications for damages and rent review in an effort at having the parties resolve the dispute. Once a mediator refuses further mediation, the dispute is referred to an arbitrator for adjudication.

The parties may also negotiate issues without the assistance of a Board mediator in at effort at resolution.

During the reporting period, the Board completed 47 cases as indicated by the Table below:

Case Completions:	Current year	Previous year
Abandoned	13	6
Settled by mutual agreement	17	8
Arbitrations	6	16
Dismissed	2	1
Summary payment orders (s. 176)	9	0
Orders to change leases	0	3
Total completed	47	34

Of the applications open at March 31, 2016, 26 were at the mediation stage of the process or pending further mediation, and 45 at the arbitration stage as indicated by the Table below:

Outstanding at March 31, 2016

Application under review	0
Application deficient	0
Examining Jurisdiction	0
Pending OGC process	0
Mediation	26
Further mediation pending	3
Arbitration	45
Total outstanding cases	74

The following Table shows the level of dispute resolution and other activities in the reporting period compared to the previous year.

Dispute Resolution & other activities:	Current year	Previous year
Mediations	35	26
Right of entry orders	18	8
Decisions following Arbitration	7	8
Cost orders	1	0
Other Board decisions *	15	12

* Includes decisions on jurisdiction and whether to re-open cases upon reconsideration.

One of the right of entry orders was to allow entry to land to construct and operate natural gas wells and a water source well, one to allow access to a well pad, and six to construct and operate flowlines.

The Board's decisions may be judicially reviewed under the *Judicial Review Procedure Act* within the time established by the *Administrative Tribunals Act*. One judicial review application was filed in the reporting period. The application for judicial review is from the Board's decision in *Miller v. ARC Resources Ltd.* (Order 1825-1) on an application for rent review. As of March 31, 2016, the judicial review application had not been heard.

Decisions of Note

What follows is a brief synopsis of some of the Board's decisions of note in the reporting period.

Petroleum and Natural Gas Act

Jurisdiction – The Board issued one decision on the issue of whether a pipeline or segment of a pipeline was a "flow line" within the meaning of the *Petroleum and Natural Gas Act* and the *Oil and Gas Activities Act*. If a pipeline is not a "flow line", the Board does not have jurisdiction to make a right of entry order or determine compensation payable to a landowner. In *Encana Corporation v. Jorgensen*, Order 1852/1853-1, the Board found a pipeline connecting the Saturn Compressor station to a riser site and ultimately to the McMahon Plant was a "flow line" within the Board's jurisdiction. The Board found that the words "scrubbing, processing or storage facility" in the definition of "flow line" should be interpreted in accordance with the industry understanding of "processing" of natural gas. As such, the facilities demarcating the extent of the Board's jurisdiction are those facilities that process the natural gas into marketable gas.

Compensation – The Board determined the compensation payable for entry to and use of Lands for a new access road to an existing well site in *Venturion Oil Limited v. Juell*, Order 1845/58-2.

Section 164 – Section 164(1)(b) allows a party to a surface lease to apply to the board in respect of "a disagreement respecting whether the surface lease should be amended based on a claim by a party that the oil and gas activity as approved by the commission on the land that is subject to the surface lease is substantially different from the oil and gas or related activity that was proposed during negotiation of the surface lease." On an application under this section, the board may make an order amending the terms of the surface lease. In *Juell v. Venturion Oil Limited*, Order 1845/58-2 the Board found that the company's proposal to repurpose an existing non-producing oil well into a horizontal water injection well was substantially different from the oil and gas activity proposed when the surface lease was negotiated in 1979. The Board ordered that the surface lease be amended to make it clear that it did not cover using any of the land for a water source well or for a horizontal water injection well.

Costs – In *Spectra Energy Midstream Corporation v. London*, Order 1694-4, the Board denied the landowner's application for costs in relation to the arbitration of an application for compensation that was wholly unsuccessful and for damages that was withdrawn during the arbitration without evidence in support being tendered. The company had made a reasonable offer to settle the compensation claim that exceeded the Board's award.

Orders for non-payment of rent – The Board made nine orders pursuant to section 176 of the *Petroleum and Natural Gas Act* requiring Terra Energy Corporation to pay rent owing to landowners under surface leases.

Other Board Activities

Administration:

The Property Assessment Appeal Board (PAAB) provides administrative services to the Surface Rights Board pursuant to a Memorandum of Understanding between the Ministry of Natural Gas Development, the Ministry of Community, Sport and Cultural Development (responsible for PAAB), and PAAB. The SRB has a Service Agreement with Service BC in Fort St. John and Dawson Creek to provide the public with a local contact point and personal assistance in reviewing applications. The volume of inquiries through Service BC is very low. Most clients communicate directly with the Board through its office in Richmond via email or toll free phone or fax.

Security Deposits:

The Board collected $40,000 in security deposits in the reporting period.

The Ministry of Finance is holding $260,850 in security deposits that the Board ordered paid prior to entering land. The Board processed four applications for the return of security deposits and ordered refunds totaling $24,500.

Filing of Surface Leases:

Section 178 of the *PNGA* requires the holders of surface rights to provide the Board with copies of surface leases and right of way agreements. Compliance with this provision was initially slow, but the Board now frequently receives copies of surface leases and amendment agreements as required. The Board does not know whether all surface leases and amendment agreements are being filed.

The Board is required to make copies of surface leases and right of way agreements available for public inspection at its office. Occasionally, members of the public have attended at the Board's office to view leases. The Board provides electronic access to electronic copies of leases to the Farmers Advocates Office for inspection on their agreement not to copy or distribute the leases.

The Board provided input to Ministry staff with respect to the development of a Regulation to allow the Board to publish surface lease information and create a searchable data base to assist parties before the Board with research on lease payments. The Regulation has not yet been enacted.

Case Management System:

The Board has designing a case management system to enable it to more easily track and manage applications and communicate with parties. Given the limited budget, the Board obtained assistance from the Property Assessment Appeal Board. This has the advantage of significantly reducing the build costs, however, one downside is the anticipated launch date has been delayed until the Fall of 2016. Given the restricted budget, the system will not be as sophisticated as others in the tribunal community, however, it will offer gains in efficiency.

Finances

The Board's budget for 2015/16 was $108,000. As detailed in the table below, the Board was over budget by $3,176.

Expenditure Type	Budget	Actuals	Variance[1]	Notes
Salaries[2]	55,000	26,306	28,694	Effective September 1, the Chair became a part-time appointee instead of being paid under Salaries
Benefits	13,640	6,524	7,116	
Board Member fees and expenses	15,860	35,775	(19,915)	
Travel	3,500	0	3,500	Allocated to other expenditures
Information systems	[illegible],000	37,185	(27,185)	Developing a case management system and lease data base
Office and business[3]	10,000	5,386	4,614	
Total Expenditures	**108,000**	**111,176**	**(3,176)**	

Notes:

1. In the variance column (brackets) denote that actual expenditures were over budget.

2. The majority of salaries and benefits were for the Chair and Vice Chair who were cross-appointed to the Property Assessment Appeal Board.

3. Overhead charges were billed at 15% of salary and benefits costs as per an MOU between the Property Assessment Appeal Board and the Ministry of Natural Gas Development.

Challenges for 2016/17:

The Board will continue to work with the Ministry in the development of regulations under the *PNGA*. Government is drafting a regulation which will prescribe the information from surface leases that the Board may publish pursuant to section 178(4) of the *PNGA*. The Board has been developing a web-based searchable lease database to be launch in 2016/17 once the regulation is enacted. In the meantime, the Board is maintaining electronic copies of surface leases and amendment agreements and making them available for public inspection in accordance with section 178(3) of the *PNGA*.

The Board would also like to work with the Ministry in the development of an administrative penalty regulation enabling the Board to impose administrative penalties under section 179 of the *PNGA* for failure to provide the Board with copies of surface leases under section 178 of the *PNGA*. In the meantime, the Board continues to work with industry and other stakeholders to encourage compliance with section 178 of the *PNGA*.

The Board will complete a new case management system to improve the efficiency and effectiveness of managing the caseload.

The Chair will continue to ensure the Memorandum of Understanding with the OGC is effectively providing for coordinated dispute resolution in cases involving the same parties and land.

Appendix 1

Overview of the Board's Process

Application

An application must be made on the form prescribed by the Board in its Rules. The Board reviews applications to ensure that they are within its jurisdiction and that they are complete and comply with the Board's Rules and relevant legislation. If an application is deficient, the Board will write to the applicant to provide an opportunity to correct any deficiencies. The Board may dismiss the application if the deficiencies are not corrected, or if an application is not within the Board's jurisdiction.

Mediation

A mediation is a dispute resolution process that attempts to facilitate resolution of the issues by agreement. A mediations may be conducted in-person or by telephone conference. A mediation is confidential and without prejudice to the positions the parties may take later in any arbitration proceedings.

If the parties have not resolved the issues at the end of the mediation session, the Board Member may schedule another mediation or refuse further mediation. If the mediator determines that access to private land is needed to explore for, develop or produce a subsurface resource, the mediator may issue a right of entry order and order the payment of a security deposit and partial payment for compensation. If the mediator makes an order refusing further mediation, the Board must arbitrate the dispute.

Arbitrations

The Board must arbitrate when the parties cannot reach an agreement. An arbitration is a dispute resolution process where each party presents evidence and arguments and the Board makes a decision based on those submissions.

Before an arbitration hearing, the Board will require the parties to attend a pre-hearing conference, usually conducted by telephone. The Board member will, in consultation with the parties, determine how the application will proceed including determining the issues to be decided, and setting dates for hearing and for the pre-production of evidence and witness lists.

The Board may conduct an arbitration hearing by telephone conference, by written submission, or in-person depending on the nature and complexity of the issues.

In-person hearings are open to the public and may be presided over by a panel of one or more members of the Board. Persons giving evidence at a hearing must swear an oath or affirm that their evidence will be the truth. The panel has control over the conduct of the hearing, including how the evidence is presented, what evidence is admitted, and the issuance of summons for witnesses.

Following the conclusion of the arbitration hearing, the panel will issue a written decision with reasons.

Evidence

The Board may accept any evidence that it considers relevant, necessary and appropriate with the exception of evidence that is inadmissible in court because of a privilege under the law of evidence. The Board will normally set timelines in advance of the hearing for the parties to submit documents or expert reports they intend to rely on at an arbitration.

Withdrawals or Consent Orders

A party may withdraw all or part of an application at any time, by completing a Withdrawal Form and delivering it to the Board and the other parties. If the parties settle the application, they must advise the Board and either withdraw the application or request that the Board incorporate the terms of the settlement into a Consent Order.

Costs

The Board may order a party to pay all or part of the costs of another party and, in exceptional circumstances, may order a party to pay the costs of the Board. Ordinarily, unless otherwise ordered by the Board, landowners may expect to recover their costs of the mediation process relating to applications for right of entry and associated compensation. The Board may order costs on its own initiative or on the application of a party.

Appealing the Board's Decision

Decisions of the Board may be judicially reviewed by the Supreme Court of British Columbia.

Appendix 2

Board Members' Biographical Information

Cheryl Vickers, Chair

Cheryl Vickers is a lawyer and formerly practiced in a variety of fields, including administrative law. Cheryl was appointed as Chair of the Mediation and Arbitration Board in July 2007. She also serves as Chair of the Property Assessment Appeal Board, a position to which she was appointed in January 2003, and in March 2013, Cheryl was appointed Acting Chair of the Civil Resolution Tribunal. Cheryl was active in the development of the British Columbia Council of Administrative Tribunals (BCCAT), and served as a member of that organization's Board of Directors including as Secretary from 1996 to 1998 and as President from 2004 to 2006. Cheryl has assisted in curriculum development for BCCAT courses offering training to appointees of quasi-judicial boards and tribunals. She has delivered these courses and workshops on case management and alternate dispute resolution for tribunals.

Simmi K. Sandhu, Vice Chair

Simmi Sandhu is a lawyer, called to the BC Bar in 1990. Simmi was appointed as a member of the Mediation and Arbitration Board in 2007 and is also a Vice Chair of the Property Assessment Appeal Board, a position she has held since 2001. As a lawyer, Simmi's areas of practice included administrative law, civil litigation, corporate/commercial law and real estate transactions. She has extensive experience in quasi-judicial proceedings, having acted as a Chair of the Board of Referees and has training and experience in conflict resolution and mediation. Simmi is on the Board of Directors of the British Columbia Council of Administrative Tribunals, currently serving as Past President.

Robert Fraser

Active in the real estate industry for many years, Rob Fraser has been a sales person, agent/manager, owner, local board president, provincial association president, and chair of a real estate related insurance company. In addition to his extensive experience and training in real property valuation, Rob also has expertise and training in conflict resolution, mediation, arbitration, and negotiation. He has a BA, an MA and did doctoral studies specializing in micro-demographic models. Rob was appointed as a Vice Chair to the Property Assessment Appeal Board in 1998. He was appointed to the Mediation and Arbitration Board as a member in 2007 and served as Vice Chair from December 2008 until July 2012.

Valli Chettiar

Valli Chettiar was appointed to the Surface Rights Board in 2012, and she is also a Vice Chair of the Property Assessment Appeal Board. Valli received her law degree from UBC, clerked for the Supreme Court of British Columbia, and was admitted to the BC Bar in 1993. Prior to establishing her sole practice in 2007, Valli held senior positions including partner of Borden Ladner Gervais LLP and General Counsel to Phillips, Hager & North Investment Management Ltd. Her practice areas included corporate, commercial, securities, real property, estates and trusts, corporate governance and administrative law. Valli has experience in dispute resolution, and served on the BC Health Professions Review Board from 2008 to 2010. Valli has also served on many professional, business, community and governmental organizations.

Winton Derby, Q.C.

Winton Derby practiced as a litigator in corporate, commercial, securities, family and administrative law and spent over 40 years at a national law firm, heading the Litigation group in the Vancouver office. He was called to the British Columbia Bar in 1965 and appointed Queen's Counsel in 1986. Winton was general counsel at a large restaurant chain and at a Vancouver based investment firm. His experience includes acting on professional negligence, contract, personal injury, property, slander and family matters. Winton has represented clients in numerous mediations and arbitrations and currently is a mediator and arbitrator at a Vancouver law firm. He is a member of the Property Assessment Appeal Board and was appointed to the Surface Rights Board in June 2014.

Howard Kushner

Howard Kushner is a practicing lawyer in Vancouver. He is a member of both the Law Society of British Columbia and the Law Society of Alberta. Howard has extensive experience in administrative law, having taught at the Faculty of Law, University of British Columbia and the Faculty of Law, University of Alberta and practiced in the area for over 15 years. Howard was the first Chief Legal Officer of the Law Society of British Columbia and the Deputy Executive Director – Regulation with the Law Society of Alberta. Prior to that, Howard was the Ombudsman for the Province of British Columbia. He is a member of the Property Assessment Appeal Board and was appointed to the Surface Rights Board in June 2014.

Brian Sharp

For 30 years, Brian Sharp owned and managed a real estate brokerage comprised of 180 real estate agents and 20 staff, with offices in Victoria, Westshore, Sidney, and Duncan, BC. During this time, he served on many committees for the Victoria Real Estate Board including mediation and arbitration of real estate disputes. Brian was the first recipient awarded the Victoria Real Estate Board Managing Broker of the Year in recognition of his role in mediating disputes between the real estate industry and the public. Since 2009, Brian has

been the Vice Chairperson of the Parks and Recreation Commission for the Municipality of Oak Bay. He was appointed to the Property Assessment Appeal Board and the Surface Rights Board in November 2012.